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in the  
**Supreme Court**  
of the  
**United States**

SPRING TERM 1977

MISC. NO. 76-1439

LOUIS M. PIHAKIS,

*Petitioner*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEAL  
FOR THE FIFTH CIRCUIT**

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UNITED STATES OF AMERICA,

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEAL  
FOR THE FIFTH CIRCUIT**

The Petitioner, LOUIS M. PIHAKIS, by undersigned counsel, respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, Case No. 76-1142.

## OPINIONS BELOW

The original opinion and judgment and judgment denying rehearing of the Court of Appeals are not yet reported. Copies of the original opinion and judgment and judgment denying rehearing are included in the Appendix to this Petition.

The Order of the United States District Court, Middle District of Florida and Opinion denying Petitioner's Motion to Dismiss is unreported. A copy of the District Court Order and Opinion is included in the Appendix to this Petition.

## JURISDICTION

The Opinion and Judgment of the Court of Appeals was entered on January 21, 1977. Rehearing was denied on February 19, 1977 without opinion. By Order dated March 15, 1977 the time for filing this Petition was extended by this Court (No. A-745) to April 18, 1977. The jurisdiction of this Court is based upon Title 28, United States Code §1254(1).

## QUESTIONS PRESENTED FOR REVIEW

DOES THE DEFENDANT'S SILENCE DURING RITUAL GUILT PLEA QUESTIONING OVERCOME THE FIFTH AMENDMENT DAMAGE DONE BY PROSECUTORIAL DECEPTION AS TO FUTURE INDICTMENT MOTIVATION BEHIND DISMISSAL OF A RELATED INDICTMENT DISPOSITION OF WHICH WAS AN INTEGRAL PART OF THE PLEA NEGOTIATION PROCESS.

## CONSTITUTIONAL PROVISION INVOLVED

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived in life, liberty, or property, without due process of law; nor shall private property be taken for public use, without jurisdiction.

## RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 11, Federal Rules of Criminal Procedure, 18 U.S.C.A.

The pertinent text of Rule 11 is set out in the Appendix.

## STATEMENT OF THE CASE

On January 7, 1971, the defendant was indicted by a Federal Grand Jury in Birmingham, Alabama and charged, together with others, with mail fraud and conspiracy in violation of 18 United States Code §§1341 and



371. The Grand Jury was investigating a major domestic and international mortgage advance-fee fraud.<sup>1</sup>

At the time the Birmingham indictment was returned, the defendant was also under indictment in Alabama State Courts for alleged similar offenses related to the Strauss group. In May 1971, defendant was tried and convicted on these State charges and sentenced to five (5) years imprisonment. Thereafter, defendant's lawyers and the government agreed to continue the Birmingham indictment until after appeals from the State convictions ended, an agreement having been reached to give defendant concurrent time on the State and Federal cases.

On May 24, 1972, the defendant and twenty others were indicted by a Federal Grand Jury in Chicago, Illinois investigating the Strauss related cases. The defense entered into negotiations with the government to transfer the Chicago indictment to Birmingham for a guilty plea under Rule 20, Federal Rules of Criminal Procedure. An understanding was reached between Bowen, the Alabama federal prosecutor, and the defense that if the Chicago indictment was transferred, a two year concurrent time arrangement would be worked out on the Alabama and Chicago cases. The Chicago federal prosecutor participated in these Rule 20 discussions.

Twenty-six months elapsed between return of the Alabama federal indictment and Defendant's March 5, 1973 guilty plea to it. During this time, the Defendant's State conviction was overturned and remanded for new trial.

<sup>1</sup>The investigation was coordinated by the Department of Justice which contemplated indictments in other districts. The related investigation came to be known as the "Strauss group" after the name of its central figure Michael A. Strauss.

Shortly before the Defendant's guilty plea, an agreement was reached whereby he would receive a two-year federal prison sentence concurrent with two years probation on the State charges and was told by the Alabama federal prosecutor that the Chicago indictment had been dismissed.

Believing this to constitute a package "wrap up" of his Strauss related problems, the Defendant entered his guilty plea, before the Honorable Sam C. Pointer, United States District Judge, during which process the Defendant disavowed any plea agreements or understandings concerning *both* the Chicago federal and Alabama State charges. Judge Pointer told the defendant that if there were any such agreements he would reject the guilty plea. Judge Pointer accepted the plea and sentenced the defendant to two years in federal prison.

The defendant was paroled on his federal sentence after fifteen months and was due to complete his parole on May 5, 1975.

On April 25, 1975, the Federal Grand Jury in Tampa, Florida returned the instant indictment against the defendant and others. The Chicago indictment and the instant indictment are virtually identical although the present indictment is less sweeping.

Believing the instant indictment to be in violation of his understanding at the time of his Alabama guilty plea, the defendant launched an investigation into the apparent injustice of his reindictment. The investigation revealed that on February 28, 1973, just one week before defendant's guilty plea, the Justice Department instructed the Chicago federal prosecutor to dismiss the Chicago indict-

ment so that a new "more sweeping" indictment "involving substantially the same operations" could be brought "at a later date".

On March 2, 1973, the Chicago indictment was dismissed. The Chicago federal prosecutor told the Alabama federal prosecutor of the dismissal *and* of the reason for it. Prior to the guilty plea the Alabama federal prosecutor told the defendant and his lawyers that the Chicago indictment had been dismissed. He did *not* tell them why.

Believing the instant prosecution to be manifest injustice because his Alabama guilty plea was induced in large measure by the prosecutor's strategic silence concerning the reason for dismissal of the Chicago indictment, the defendant moved to dismiss the instant indictment.

An evidentiary hearing was held on the defendant's Motion to Dismiss at which testimony was elicited precisely in line with the foregoing statement of facts.

Finding that the record revealed the defendant's concern with disposition of Chicago indictment; that this concern was expressed to the government by defendant's counsel and that, prior to the defendant's guilty plea the Alabama federal prosecutor knew of the Chicago dismissal and the reason for it but did not tell the defendant of the future indictment plan, Judge Krentzman nevertheless concluded both that no plea bargain had been violated and that the defendant had not been deceived by the government into entering his plea.

The case was submitted non jury on stipulated facts. Defendant was found guilty on three counts and sentenced to two years in federal prison concurrently on each count.

On appeal to the Fifth Circuit, the defendant did not rely on the theory that the government promised him not to be the subject of a future Strauss prosecution. The defendant's argument on appeal was that the uncontroverted facts in this record show that the Alabama federal prosecutor misled and deceived the defendant concerning disposition of the Chicago indictment knowing perfectly well the defendant's desire for package disposition of all pending Strauss problems, and that, by this deception, the defendant's right to Due Process of Law was violated.

## REASONS FOR GRANTING THE WRIT

### I

#### THE DECISION BELOW PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW CENTERING ON A DEFENDANT'S RIGHT TO BE DEALT WITH HONESTLY AND FAIRLY BY PROSECUTORS IN PLEA NEGOTIATIONS

The importance of the issues presented in this case cannot be overemphasized when one considers the history of this Court's rulings as to the importance of the event of a guilty plea in the criminal justice system. Justice Douglas pointed out in *Santobello v New York*, 404 U.S. 257, 264 (1971), that the entrance of a guilty plea "is a serious and sobering occasion." This Court has repeatedly held that the guilty plea waives virtually every provision of the Bill of Rights related to the guarantee of a fair and impartial trial, *Malloy v Hogan*, 378 U.S. 1 (1964); *Pointer v Texas*, 380 U.S. 400 (1965); *Washington v Texas*, 388 U.S. 14 (1967); *Duncan v Louisiana*, 391 U.S. 145 (1968); *In Re Winship*, 397 U.S. 358 (1970).



In *Santobello*, *supra*, the Court memorialized its view of the importance of plea dispositions to the criminal justice system.

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

In light of the importance of the event both to the defendant and to the system, the Court in *Santobello*, held that the watchword of the plea negotiation process is "fairness". 404 U.S. at 261.

This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello*, 404 U.S. at 262.

*Santobello* and its predecessor *Machibroda v United States*, 368 U.S. 487 (1962), teach that the formalistic recitations in the record that indicate the plea was "voluntary" cannot prevent a defendant from later complaining if the prosecutor breaches the agreement that induces the plea. Even the opinion below recognizes this proposition.

This case presents squarely for the Court's decision the situation where a prosecutor deceives and misleads a defendant during the plea negotiation process by supplying him false or half true information on a matter of known importance and then, along with the defendant, stands before a federal judge taking a guilty plea and does not disclose the truth. This is crucial — of all who were present before Judge Pointer when the defendant entered his guilty plea, only Bowen, the Alabama federal prosecutor, knew why the Chicago Indictment had been dismissed. Yet, the Fifth Circuit puts upon the defendant alone the burden of his silence rejecting his contention that his counsel advised him not to throw a wrench into the works by opening the subject of the Chicago or Alabama State charges which the defendant thought were completely disposed of.

In *Berger v United States*, 295 U.S. 78 (1935) this Court recognized that our courts presume only the highest standards of fair play and ethical conduct on the part of United States Attorneys. The Courts of Appeal have consistently remedied situations involving guilty pleas unfairly induced, *see e.g. United States v Correale*, 479 F.2d 944 (1st Cir. 1973); *United States v Carter*, 454 F.2d 426 (4th Cir. 1972); *Johnson v Beto*, 466 F.2d (5th Cir. 1972); *White v Goffney*, 435 F.2d 1241 (10th Cir. 1970). Even



the Fifth Circuit has stated expressly that the government will not be permitted to lure a defendant into a guilty plea on false information. *United States v Battle*, 467 F.2d 569 (5th Cir. 1972).

Throughout these proceedings, the Defendant has contended that his guilty plea was dependent on package disposition of all pending Strauss cases. The defendant presented numerous witnesses below, including himself, his attorneys at the time of the plea, and the Alabama federal prosecutor, all of whom confirmed the defendant's concern with package disposition. The defendant, his family and lawyers testified that they felt that dismissal of the Chicago indictment meant an end to his Strauss problems after he served his prison sentence.

Nevertheless, the District Judge concluded that "the evidence does not sustain Pihakis' contention that the government attorneys deceived him, or coerced his guilty plea in Alabama." It is impossible to see how a defendant would establish the inducing effect of a deception such as that used in this case other than by a combination of his own testimony and that of those familiar with the circumstances, and by a showing that all objective factors support his contention.

If the trial court is permitted to reject a contention such as that in the instant case despite its recognition that the prosecutor did deceive the defendant, then no accused anywhere could prevail on such a motion wherever the Judge, for whatever reason, decided to make an adverse "credibility choice".

This Court must decide whether its previous pronouncements concerning Due Process and fundamental fairness in the plea bargaining process are to have the force of law. Where a prosecutor deceives, misleads or supplies misinformation to a defendant in the plea bargaining process with a probability that such conduct played a part in inducing a guilty plea, *any* adverse impact suffered as a result must be appropriately remedied. As the Court pointed out in *United States v Correale*, 479 F.2d 944 (1st Cir. 1973),

We must reverse not because of any lack of good faith but only because the most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining.

. . . .

Nor are the obligations to avoid misrepresentations or improper promises limited to good faith efforts. Prosecutorial duties affecting the fairness of trials have never been so restricted . . . . The same is true of the government's role in plea bargaining . . . Prosecutorial misrepresentations, though made in good faith, even to obtain a just, and here a mutually desired end, are not acceptable. 479 F.2d at 947.

The plea bargaining process "presuppose[s] fairness in securing agreement between an accused and a prosecutor." *Santobello, supra*, 404 U.S. at 261. The Due Process Clause requires fairness and this Court must insist upon it.

## II

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE FIRST CIRCUIT IN *CORREALE v UNITED STATES*, 479 F.2d 944 (1st Cir. 1973) AND THE FOURTH CIRCUIT IN *UNITED STATES v HAMMERMAN*, 528 F.2d 326 (4th Cir. 1975)

In Point I above, the defendant has urged the adoption of an enforceable, relief justifying, *per se* rule that prosecutors must play fairly and honestly in the negotiation of guilty pleas and has suggested that the rule be applicable where objective factors in the record combine with whatever other competent evidence, if any, is available to demonstrate that the defendant probably relied on the misinformation given him by the prosecutor. The decision below and the decision of the District Court seem to hold that even where it is uncontroverted that the defendant was misinformed by the prosecutor and that the subject of the misinformation was one of continued interest to the defense, a district judge is free to find, as a matter of discretion or credibility choice, that no harm was done.

In *United States v Correale*, 479 F.2d 944 (1st Cir. 1973) the government agreed to recommend a federal sentence which would run concurrently with defendants four to eight year state sentence. Under federal law, however, such a sentence was not permissible and although at sentencing the prosecutor owned up to the problem with the cryptic unexplained remark that the defendant had no chance of a concurrent sentence, the court, defense counsel and defendant were left in the dark as to the meaning of

the remark and the bargain went unperformed. The crucial language from the *Correale* case is set out at the end of the previous part. The holding of the Court is that, the good faith of the prosecutor notwithstanding, misrepresentations are not permitted and, where made, will not go uncorrected. 479 F.2d at 947.

More recently, in *United States v Hammerman*, 528 F.2d 326 (4th Cir. 1975), the Fourth Circuit held that a prosecutor's apparently good faith misrepresentation to the defendant as to the likelihood of the court's following his "no jail" recommendation warranted permission for the defendant to withdraw his guilty plea after he was sentenced to eighteen months. The court noted that the prosecutor's "confirming acceptance" of the plea bargain by the trial court "formed a significant part of the inducement for the guilty plea." 528 F.2d at 331.

Interestingly, the Court in *Hammerman*, unlike the Court in *Correale*<sup>2</sup> and in the instant case, did not have the benefit of direct testimony as to the degree or significance of the inducement involved in the deception inasmuch as the case arose on direct appeal from the conviction and sentence. Thus, the Court relied on the presence of objective factors and granted the defendant "what is reasonably due in the circumstances". *Hammerman*, 528 F.2d at 332 citing *Santobello, supra*, 404 U.S. 262.

<sup>2</sup>Defendant's claim in *Correale* was presented in a petition pursuant to 28 U.S.C.A. §2255 on which a full evidentiary hearing was held. The District Court rejected the Defendant's contention that he had been misled but the First Circuit granted relief.

Significantly, both the *Correale* and *Hammerman* courts rely solely on the existence of two factors as justifying relief:<sup>3</sup>

1. A misrepresentation by the prosecutor.
2. The likelihood that the misrepresentation was relied upon by the Defendant as part of his decision to plead guilty.

Under the specific findings of the District Judge in this case, both of the crucial factors are present. Judge Krentzman found that the prosecutor told the defendant about the Chicago dismissal and that he knew of but failed to reveal the future indictment motive behind it and that disposal of the Chicago case was an "understandable concern" of the defense. By denying the defendant relief, therefore, the decisions below create a direct conflict with the decisions of the First and Fourth Circuits.<sup>4</sup>

<sup>3</sup>Under *Santobello v. New York*, 404 U.S. 257 (1971), the appropriate relief is to be based on the particular circumstances of each case. In *Correale, supra*, the Court granted the relief most approximating specific performance of the plea agreement. 479 F.2d at 950. In *Hammerman, supra*, the Defendant was permitted to plead anew. 528 F.2d at 332.

<sup>4</sup>See also, *United States v. Goodrich*, 493 F.2d 390 (9th Cir. 1974); *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972); *McClure v. Bowles*, 233 F.Supp. 928 (N.D.W.Va. 1964).

### III

THIS CASE PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

As indicated previously herein, this Court in *Santobello v. New York*, 404 U.S. 257 (1971) and *Machibroda v. United States*, 368 U.S. 487 (1962) made it clear that a guilty plea was not voluntary where induced by an unkept promise by the government notwithstanding the defendant's denial of the existence of such promises during the formal proceeding under Rule 11, Federal Rules of Criminal Procedure, 28 U.S.C.A., at which voluntariness of the plea is determined. The rule has been extended by various circuits to include representations by an accused's counsel that, by agreement with the prosecutor, he will receive a given punishment when, in fact, a greater punishment is imposed. See e.g., *United States v. Hawthorne*, 502 F.2d 1183 (3d Cir. 1974); *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974); *Roberts v. United States*, 486 F.2d 980 (5th Cir. 1973); *Walters v. Harris*, 460 F.2d 988 (4th Cir. 1972) (by implication), *cert. den.* 409 U.S. 1129 (1973).

The Circuit Courts have long grappled with the question of the extent to which a defendant's formalistic answers during Rule 11 proceedings will preclude later collateral or other relief. The *en banc* Fifth Circuit has held that a §2255 evidentiary hearing was not required where the record of the Rule 11 guilty plea hearing reflected no agreements between prosecution and defense and all that



petitioner presented were his unsupported allegations of a breached promise. *Bryan v United States*, 492 F.2d 775 (5th Cir. 1974) (*an banc*).

A year later, however, a panel of the Fifth Circuit distinguished *Bryan* and granted relief to a defendant who had alleged "secret pressures" and the "suppression of an unraised fact" notwithstanding his Rule 11 silence. *Vandenadez v United States*, 523 F.2d 1220 (5th Cir. 1975).

In this case defendant's silence or disclaimers was seen as "persuasive evidence" by the Fifth Circuit. However, it is difficult to see how this amounts to any evidence in light of the findings of the Court that the Defendant was lied to. It should be remembered that the defendant also disclaimed any bargain as to the Alabama State charges but the record unequivocally establishes the existence of such a bargain -- concurrent probation. Had the defendant never been indicted in the instant case, he certainly would have justifiably believed that it was because the Chicago Indictment had been dismissed as part of his earlier pre-plea negotiations. After all, that is the only thing he could have thought when the prosecutor told him it had been dismissed without anything more. Under these circumstances, the defendant's silence in the face of the Court's questioning is understandable especially after the Court tells him his plea will not be accepted if there are any other bargains.

The Court had recently granted certiorari in a case where a defendant alleged that his counsel had misrepresented a plea agreement with the prosecutor and the Fourth Circuit held that, if so induced, the plea was involuntary notwithstanding the defendant's silence at Rule 11 pro-

ceedings. *Allison v Blackledge*, 533 F.2d 894 (4th Cir.) cert. granted, sub nom *Blackledge v Allison*, \_\_\_\_ U.S. \_\_\_\_, 97 S.Ct. 55 (1976).

This case involves a slightly different situation. In the case of *sub judice*, the issue does not involve a direct promise by a prosecutor as to a particular sentence nor a representation by defense counsel as to a plea agreement. In this case, the Court is dealing with a misrepresentation of a fact material to plea negotiations but not the end product or agreement itself. Thus, while *Santobello* and *Machibroda*, *supra* make it clear that a defendant's silence during the taking of his guilty plea will not overcome the due process damage done by a prosecutor's unkept promise as to a particular sentence, the Court has yet to decide whether the same rule applies where defense counsel misrepresents the bargain or where the misrepresentation involves a material fact involved in the bargaining process. Presumably, the former situation will be resolved by the Court in *Blackledge*, *supra*. Whereas, this case presents squarely the issue of whether the defendant's silence during ritual guilty plea questioning overcomes the Fifth Amendment damage done by prosecutorial deception as to the future indictment motivation behind dismissal of a related indictment disposition of which was an integral part of the plea negotiation process. By deciding this question, the Court can resolve the ongoing debate taking place in the Courts of Appeal over the circumstances in which a defendant is entitled to relief following the taking of his guilty plea where it appears that he has been unfairly induced into the plea.



**CONCLUSION**

For the foregoing reasons, Petitioner requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted

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By \_\_\_\_\_  
EDWARD R. SHOHAT

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15 day of April, 1977, to Solicitor General, Department of Justice, Washington, D. C. and Morris Silverstein, Fraud Section, Criminal Division, Department of Justice, Washington, D. C.

\_\_\_\_\_  
EDWARD R. SHOHAT

## **APPENDIX**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH DISTRICT

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No. 76-1142

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UNITED STATES of America,  
Plaintiff-Appellee,  
v.

Louis M. PIHAKIS,  
Defendant-Appellant.

Jan. 21, 1977.

The United States District Court for the Middle District of Florida, at Tampa, Ben Krentzman, J., found defendant guilty of mail fraud and conspiracy to commit mail fraud, and he appealed, challenging the district court's denial of his pretrial motion to dismiss the indictment, which he alleged to have been returned in breach of a previous plea bargain with the Government. The Court of Appeals held that although, when a plea rests to a significant degree on a promise or agreement of the Government inducing the plea, such promise must be fulfilled, on the record presented in the instant case it could not be said that the District Court committed clear error in concluding that the Government made no express or implied promises relating to Chicago charges and that the defendant's guilty plea in Birmingham was in no way conditioned on an implied promise by the Government not to prosecute the Chicago charges in another district.

Affirmed.

## Criminal Law — 273.1(2)

Although, when a plea rests to a significant degree on a promise or agreement of the Government inducing the plea, such promise must be fulfilled, on the record presented in the instant case it could not be said that the district court committed clear error in concluding that the Government made no express or implied promises relating to Chicago charges and that the defendant's guilty plea in Birmingham was in no way conditioned on an implied promise by the Government not to prosecute the Chicago charges in another district. Fed.Rules Crim. Proc. rule 20, 18 U.S.C.A.

Appeal from the United States District Court for the Middle District of Florida.

Before GEWIN, GEE and FAY, Circuit Judges.

## PER CURIAM:

This case is a direct appeal from appellant's conviction for mail fraud and conspiracy to commit mail fraud, 18 U.S.C. §§ 1341, 371. The trial was before Judge Krentzman on stipulated facts. Appellant was found guilty of three counts and was sentenced to two years' concurrent imprisonment on each count. The only issue presented on appeal involves the district court's denial of appellant's pre-trial motion to dismiss the indictment, which appellant alleged to have been returned in breach of a previous plea bargain with the government. We affirm the district court's ruling on the motion.

Between 1970 and 1976 appellant faced several state and federal indictments on charges arising from his alleged participation in a nationwide advance mortgage fee operation organized by one Michael Strauss. In January, 1971, appellant and others were indicted on five counts of ~~Birmingham indictment until exhaustion of appeals of Ala-~~ federal mail fraud and conspiracy in Birmingham, Alabama. He and the government agreed to continue the Birmingham indictment until exhaustion of appeals of Alabama state convictions on similar charges. Those state convictions were eventually reversed, exposing appellant to further state prosecution. In May, 1972, appellant and twenty others were indicted on federal mail fraud and conspiracy charges in Chicago. On February 8, 1973, Chief of the Fraud Section of the Justice Department's Criminal Division directed the federal prosecutor in Chicago to dismiss the indictment there because the department was planning to obtain elsewhere a more sweeping indictment on the same charges. On March 2, 1973, an assistant U.S. Attorney in Chicago secured dismissal of the indictment and so notified Mr. Bowen, the federal prosecutor in Birmingham. Three days later appellant pleaded guilty to the Birmingham federal indictment and received a two year sentence. As part of the plea arrangement, appellant pleaded guilty to state charges and was placed on probation concurrent with his federal sentence. In this way appellant avoided incarceration in an Alabama penal institution.

After the instant federal indictment was returned in April, 1975, in Tampa, Florida, appellant moved to dismiss on the ground that the government impliedly had agreed as part of the Birmingham plea bargain not to prosecute additional Strauss-related charges against him. Judge



Krentzman held a hearing on the motion at which he heard testimony from appellant's relatives, his Birmingham defense attorneys, and government attorneys from Birmingham and Chicago. After considering that testimony and the transcript of the Birmingham guilty plea proceeding, at which Judge Pointer presided, the court below concluded that appellant's guilty plea was not conditioned upon dismissal of the Chicago indictment and that the government did not impliedly promise not to prosecute the Chicago charges in another district or otherwise deceive him.

Appellant's implied promise argument is based upon the following facts: (1) attorneys for the government and for appellant had discussed the possibility of a transfer of the Chicago charges to Birmingham with a resulting two-year concurrent sentence on the consolidated federal charges; and (2) the Alabama federal prosecutor advised appellant of the Chicago dismissal prior to his guilty plea without also advising him of the government's plan to obtain elsewhere another indictment on the same charges.

We do not think the district court clearly erred in its findings of fact or erred in its conclusion that the government's conduct did not constitute an implied promise. First, the transfer discussions pursuant to Federal Rule of Criminal Procedure 20 became moot with the dismissal of the Chicago indictment, regardless of the reasons for the dismissal. Rule 20 discussions never went beyond the tentative stage, as appellant did not request the transfer in writing and the U.S. attorneys in both districts did not approve the transfer in writing as required by the rule. Assuming arguendo that the Alabama federal prosecutor perhaps should have informed appellant of the government's motive in dismissing the Chicago indictment, this

omission under the facts and in the circumstances of this case did not constitute an implied promise that the government would never prosecute those charges. The Alabama federal prosecutor disclaimed an ability to control or to prevent prosecutions in other districts.

Persuasive evidence of appellant's understanding of the Chicago dismissal comes from the transcript of his Birmingham guilty plea proceeding. Judge Pointer specifically inquired about appellant's understanding of the discussions concerning state charges and the Chicago indictment. The judge instructed appellant that if his guilty plea were contingent or conditional in any way upon what happened to the state and Chicago charges he (Judge Pointer) could not accept the plea. Appellant answered emphatically that the discussions concerning the state charges and the Chicago indictment were not conditions of his plea. Judge Pointer even suggested to appellant that he "might find [himself] faced with a trial on matters that are pending in Chicago even though you plead it at this time." Appellant answered: "That is correct, I understand it." There is no basis for any reliance by appellant after Judge Pointer cautioned him that his guilty plea could not be conditioned on the outcome of the Chicago charges.

We are quite aware that when a plea rests to a significant degree on a promise or agreement of the government which induces the plea, such promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427, 433 (1971). However, on this record we cannot say that the district court erred in concluding that the government made no express or implied promises relating

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to the Chicago charges and that appellant's guilty plea in Birmingham was in no way conditioned on disposition of those charges. Thus, the court did not err in denying appellant's motion to dismiss.

JUDGMENT AFFIRMED.

[TITLE OMITTED]

ON PETITION FOR REHEARING

(FEBRUARY 17, 1977)

Before GEWIN, GEE and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

WALTER P. GEWIN

United States Circuit Judge

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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

CASE NO. 75-89 Cr. T-K

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

CHARLES E. DAVIS, et al,  
Defendants.

ORDER

This came before the Court upon the motions of defendants Louis M. Pihakis, and Charles E. Davis to dismiss the indictment on the grounds that prosecution of the offenses alleged here violates a governmental promise implied from prior plea agreements whereby these defendants entered guilty pleas to conspiracy and mail fraud charges in a similar Alabama case. On August 29, 1975 and September 4, 1975 the Court held evidentiary hearings on these motions. This order constitutes the Court's findings of fact and conclusions of law relevant to these motions to dismiss the indictment.

On January 7, 1971 a federal grand jury in Birmingham, Alabama, returned an indictment in Case No. Cr. 71-28-S, Northern District of Alabama, charging defendants Pihakis and Davis, and other co-defendants, with conspiracy and mail fraud in violation of 18 U.S.C. §§371 and 1341. At the time this indictment was returned, defendant Pihakis was also under indictment in the Ala-

bama state courts for alleged similar offenses. Pihakis was convicted on the first state indictment, and the trial on the federal charges was continued upon his motion, pending disposition of his appeal in the Alabama state courts. On appeal his state court conviction was eventually reversed, and the case was remanded for trial in the state court.

On May 24, 1972 a federal grand jury in Chicago, Illinois, returned an indictment charging defendants Pihakis and Davis, and nineteen other defendants with mail fraud and conspiracy.

On March 5, 1975 Pihakis pled guilty to the five count indictment in case No. Cr. 71-27-S. Prior to that time counsel for Pihakis in Alabama, James Fullan, discussed the defendant's plea with then Assistant United States Attorney Albert Bowen, and also with Alabama state authorities. It was eventually agreed that Pihakis would plead to the federal charges in Alabama, and would also plead to the state charges, but would receive concurrent sentences, and unsupervised probation on the state charges. Pihakis was sentenced to two years upon his plea of guilty to the federal charges in Alabama, and has completed serving that sentence. The plea agreement in Alabama was not reduced to writing.

At the time of these discussions in Alabama, Pihakis was also understandably concerned with the pending prosecution in Chicago, where he was represented by other counsel, Cecil Burglass. In this regard, his Alabama counsel, Fullan, inquired as to a possible Rule 20 transfer of the Chicago charges to Birmingham. James Montana, the Assistant United States Attorney in Chicago, discussed

a possible transfer of those charges with Bowen, however, these discussions were not finalized, and on February 8, 1973 Montana was informed by the Justice Department that the Chicago indictment was to be dismissed. Specifically, John Keeney, Chief, Fraud Section, Criminal Division, advised Montana that the Chicago indictment would be dismissed, and that the Department contemplated "more sweeping cases involving substantially the same operation at a later date." The federal prosecutor in Alabama was notified of the pending dismissal of the Chicago indictment and thereupon informed Pihakis' Alabama counsel. Accordingly, the discussions concerning the possible transfer of the Chicago charges to Alabama were discontinued. The Chicago indictment was dismissed on March 2, 1973.

The federal prosecutor in Alabama, Bowen, was informed of this dismissal, and on the day of his plea in Alabama, counsel for Pihakis there, Fullan, was notified that the Chicago charges had been dismissed. The details of the Keeney letter of February 8, 1973 were not related to Fullan or Pihakis at that time. On March 5, 1973 Pihakis pled guilty to the federal charges in Alabama. A copy of the transcript of those proceedings has been filed, and was received at the hearing on August 29, 1975. On April 25, 1975 a federal grand jury here returned this twenty-five count indictment charging Pihakis and Davis, and five other persons with conspiracy and fraud.

Pursuant to Rule 20, Federal Rules of Criminal Procedure, defendant Charles E. Davis pled guilty to the Alabama indictment in Kansas City, Missouri. At the time of his plea Davis was also under indictment in two other federal cases in the Western District of Missouri charging violations of 18 U.S.C. §§ 2314 and 1341. Davis appeared



in federal court in the Western District of Missouri on May 10, 1974, on August 30, 1974, and on October 18, 1974 and pled guilty to the Missouri charges, and to the Alabama charges. Davis was represented by counsel Kenneth Simon, and Assistant United States Attorney Anthony Nugent represented the government. Davis is presently serving a thirty month sentence imposed on those charges. A transcript of the Missouri proceedings has been filed with the Court in support of Davis' motion to dismiss the indictment.

Both defendants first alleged that they entered into "plea bargains" with the government, and that the government breached these "plea bargains" after each defendant fulfilled his promise to plead guilty to the Alabama indictment. Specifically, the defendants contend that the prosecution here after their pleas of guilty to the Alabama indictment constitutes a governmental breach of an implied promise not to further prosecute these defendants for alleged offenses relating to their involvement in a nationwide advance mortgage fee operation organized by Michael Arthur Strauss.

The United States Supreme Court has approved plea bargaining procedure as one leading to "the prompt and largely final disposition of most criminal cases." *Santobello v. New York*, 404 U.S. 257, 261, 92 S. Ct 495, 498 (1971). Accordingly, while recognizing the important function plea discussions play in the disposition of criminal cases, the law requires that "if a plea bargain induced a guilty plea and the government's promise to take some action in return is not fulfilled, the person is entitled to relief." *Gallegos v. United States*, 466 F.2d 740, 741 (5th Cir. 1972), citing *Santobello v. New York*,

*supra*; *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510 (1962); *Johnson v. Beto*, 466 F.2d 478 (5th Cir. 1972); *James v. Smith*, 455 F. 2d 502 (5th Cir. 1972). In *Gallegos*, *supra*, the Fifth Circuit, en banc, held that "such a bargain is either specifically enforceable between the parties to the agreement (Court's emphasis) or the plea is void." *Id.* at 741.

Here Pihakis and Davis do not seek to void their pleas to the Alabama indictment, but to compel specific performance of what they maintain was a governmental promise implied from the plea discussions that ultimately resulted in their guilty to pleas to the Alabama indictment. In particular, they assert that the government implicitly represented that the activities which were the subject of the Chicago indictment would not be further prosecuted.

In this regard the defendants do not claim that there was a written or express promise on the part of the government not to prosecute on the Chicago charges in return for their guilty pleas to the Alabama indictment. The charges in each case were similar, but distinct as to the offenses alleged.

The indictment returned in Alabama specifically focuses on activities in the Birmingham area. The predominate companies involved in the alleged fraudulent operation in Alabama were Cumberland Insurance Investment Group and the Tangible Risk Insurance Company, Limited. Cumberland was located in Birmingham, Alabama, and the twenty-five overt acts specified in the Alabama indictment relate to operations in Alabama. Of the nine defendants charged in Alabama, three, Pihakis, Davis, and Roberts are also charged here. Michael Arthur Strauss and



Robert S. Strauss named as unindicted co-conspirators here, were charged as defendants in Alabama. It does not appear that any of the alleged "victims" in the Alabama case are alleged to have been defrauded in this case. The Anglo-Canadian Investment Group, Limited, Royden & Company, American Guarantee Title Company, and United Title Company, which are the primary companies involved in this indictment, are not alleged to have been part of the fraudulent operation which is the subject of the Alabama indictment.

The Chicago indictment charged all except one (Richard A. Leary) of the defendants here. The Chicago charges likewise involved many of the same companies and victims, as alleged here and in Alabama. In this regard, however, the defendants do not advance claims of double jeopardy in these motions to dismiss. Cf. *United States v. Buonomo*, 441 F.2d 922 (7th Cir. 1971). The assertion here is that the dismissal of the Chicago indictment without notifying the defendants of the government's intention to seek further prosecution on those alleged offenses breached a governmental promise not to further prosecute which was implied by the circumstances relating to the defendants' pleas to the Alabama indictment.

The Court, having considered the transcripts of the sentencings, the several indictments, and the evidence received at hearing, is of the opinion that the government did not promise either defendant that all charges arising from this nationwide operation would be dismissed upon his plea of guilty to the Alabama indictment.

As to defendant Pihakis, the evidence shows that while his Alabama counsel expressed concern for the prospective

prosecution in Chicago, the plea discussions were significantly related to resolving his client's pending charges in the state courts of Alabama. Pihakis' plea of guilty was not conditioned upon the dismissal of the Chicago indictment, and although it appears that the federal prosecutor in Alabama was notified of the reasons for the Chicago dismissal, the Court is of the opinion that his failure to notify the defendant of possible prosecution for those distinct offenses did not constitute an implied promise on the part of the government not to prosecute on alleged offenses on other persons in other districts. The evidence shows that the only discussions pertaining to the Chicago charges were related to a possible transfer which became unnecessary before the defendant entered his plea.

As to the defendant Davis, the transcript of the proceedings in Missouri indicates at most, that the sentencing judge inquired as to prospective prosecution, and the possibility of transfer of any related pending charges for consolidated disposition, and that the federal prosecutor was not fully informed of the Justice Department's intentions as to further proceedings against Davis. Assistant United States Attorney Nugent expressly stated that he was not aware of all potential charges against Davis, but believed that there were no other pending charges against the defendant at that time, which apparently was correct at the time. Nugent expressed no opinion as to prospective prosecution on the Chicago charges. The evidence shows that there was no express promise made to the defendant concerning prosecution for the activities which formed the basis of the Chicago indictment, and the Court finds that the circumstances surrounding the defendant's plea did

not give rise to implied promise not to prosecute on distinct offenses alleged to have occurred in other areas of the country.

Accordingly, under these circumstances the Court is of the opinion that the government made no promise to either defendant, expressly or implicitly, concerning the prospective prosecution for offenses relating to the Chicago indictment.

Defendant Pihakis contends, however, that this indictment should nevertheless be dismissed because the government unfairly obtained his guilty plea in Alabama by its failure to inform him of the Department of Justice's intention to seek indictments against him in Florida. As indicated above, the Court is of the opinion that the evidence here does not sustain Pihakis' contention that the government attorneys deceived him, or coerced his guilty plea in Alabama. This case is therefore distinct from the governmental misconduct cases cited by the defendant.

Pihakis additionally moves to dismiss the indictment on the grounds that an Assistant United States Attorney, Roger Fortuna, was not authorized to appear before the grand jury that returned this indictment. As indicated at hearing, the Court has examined Fortuna's letter of appointment, and administration of the oath of office. The defendant at hearing offered no evidence in support of his allegations, and the Court is of the opinion that this contention is without merit.

Accordingly, for the reasons expressed above the motions of defendants Louis M. Pihakis and Charles E. Davis to dismiss the indictment should be, and they are hereby DENIED.

IT IS SO ORDERED at Tampa, Florida this 30 day of September, 1975.

/s/ BEN KRENTZMAN

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BEN KRENTZMAN  
UNITED STATES  
DISTRICT JUDGE

## FEDERAL RULES OF CRIMINAL PROCEDURE

### Rule 11. Pleas

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an



attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) **Insuring That the Plea is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) **Plea Agreement Procedure.**

(1) **In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) **Acceptance of a Plea Agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) **Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) **Inadmissibility of Pleas, Offers of Pleas, and Related Statements.** Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the persons who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) **Record of Proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974; July 31, 1975, Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372.